87-1518

NO. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF FLORIDA,

Petitioner,

v.

FLOYD MORGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED

Whether the Florida Supreme Court's *sua sponte* drafting and granting of a collateral attack, without providing notice or argument to the State, violated due process.

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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF FLORIDA,

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

The Petitioner, State of Florida, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Florida entered in the case of Floyd Morgan v. State, August 27, 1987, rehearing denied December 22, 1987 and that a summary reversal obtain, instructing the Florida Supreme Court to properly review this case in accordance

with Hitchcock v. Dugger, 107 S.Ct. 1821 (1987) after permitting all parties to this cause to file briefs and be heard in compliance with the Fifth Amendment to the Constitution of the United States

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at ____ So.2d ____ (Fla. 1987), but is attached as exhibit 1 to this petition. The two prior opinions of the Florida Supreme Court appear in Morgan v. State, 415 So.2d 6 (Fla.), cert. denied, 459 U.S. 1055 (1982) and Morgan v. State, 475 So.2d 681 (Fla. 1985).

JURISDICTION

The decision of the Florida Supreme Court was rendered on August 27, 1987 and rehearing was denied on December 22, 1987. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV of the Constitution of the United States provides *inter alia*:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment X provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

STATEMENT OF THE CASE

Floyd Morgan, an inmate on Florida's "death row", collaterally attacked his judgment and sentence pursuant to Fla.R.Crim.P. 3.850. His first petition was denied as facially deficient. Morgan v. State, 475 So.2d 681 (Fla. 1985). His amended petition resulted in an evidentiary hearing and a second collateral appeal to the Florida Supreme Court.

Morgan's appeal addressed the issue of ineffective assistance of trial counsel. He specifically did not allege error under Lockett v Ohio, 438 U.S. 586 (1978) or Hitchcock v. Dugger, ____ U.S. ____, 107 S.Ct. 1821 (1987)[1] on the part of the

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[1] These cases require sentencer to consider all mitigating evidence relevant to a defendant's character or history, if offered by the defendant.

trial court.[2] Briefs were filed by the parties and oral argument was held on the single issue of ineffective assistance of counsel.

After the briefing, after oral argument and without any notice to the parties, the Supreme Court, sua sponte, "amended" the petition to include a Lockett-Hitchcock claim and granted relief to Morgan.

The State of Florida vigorously protested this action. Mr. Morgan had raised a Lockett claim in his original appeal and lost on the merits. Morgan v. State, 415 So.2d 6 (Fla.) cert. denied, 459 U.S. 1055 (1982). Five of the seven justices now on the Florida Supreme Court

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[2] We note that in Burger v. Kemp, U.S. ___, 1 F.L.W. Fed. S 1049 (1987), this Court held that a claim of ineffective assistance of counsel did not preserve a "Hitchcock" claim for your review.

did not participate in that original appeal and thus never heard or considered the State's arguments. Florida pleaded with the new justices for leave to be heard. The court refused to permit the State to be heard, orally or in writing.

Had the State been given a fair opportunity to be heard, the State would have shown that the defendant (Morgan) was in prison for second degree murder, reduced from first degree despite the fact that Morgan's crime (driving a wooden shaft up the victim's rectum) was as brutal as the stabbing at bar. (R 518, 808) While Morgan relied heavily upon his "prison adjustment" (saving a guard during a riot) the State would have shown that Morgan was regularly in trouble for possession of illegal weapons and possession of "negotiables" in prison. (R 256-257)

Morgan, somehow, became a $400 "creditor" of the victim (Saylor) while the two were inmates. Morgan killed Saylor because Saylor would not pay up. Arguably, all of Morgan's actions were directed towards protection or enhancement of his illicit prison activities. Since all facts and all inferences from the facts are taken in favor of the appellee (State) on appeal, these arguments would be proper. The State, however, was not permitted to raise them to the court, including the five new justices.

REASON FOR GRANTING THE WRIT

WHETHER THE FLORIDA SUPREME COURT'S SUA SPONTE DRAFTING AND GRANTING OF A COLLATERAL ATTACK, WITHOUT PROVIDING NOTICE OR ARGUMENT TO THE STATE, VIOLATED DUE PROCESS

The question at bar is simple: Does a state have the right to due process of law? The Petitioner urges that it does, and that its' constitutional rights and those of its citizens have been and will continue to e violated absent corrective action.

Pursuant to Rule 17(c) when a state court decides an important question of federal law which is unsettled or which has not been, but should be, decided by this Court certiorari may be granted. This is particularly true if special and important reasons for granting the writ are present. We suggest that such reasons are present in this case.

There is no question that certiorari

would, and should, be granted in a case where a defendant was denied notice of the charges (civil or criminal) filed against him, or the right to respond to the charges, to address the evidence or to argue his case. Indeed, certiorari would be granted even in the event of a summary denial of these rights, without opinion, by the lower court. The defendant's Fifth and Sixth Amendment rights would be so clearly violated that the "importance of the issue", see Gerstein v. Pugh, 420 U.S. 103, 43 L.Ed.2d 54 (1975) would prompt this Court's intervention.

The State, obviously, is not an individual, prompting some to opine that state's do not have "due process" rights. As a result, the public (represented by the state) can be denied notice, the right to confront charges, the right to confront evidence and the right to appeal and

represent the public's interest in criminal cases. We submit that these abuses can and do occur with sufficient frequency[3] and our entreaty to the Supreme Court of Florida has been so fully rejected, that certiorari should be granted despite the absence of conflict, Pernell v. Southall Realty, 416 U.S. 363 (1974); Davis v. Alaska, 415 U.S. 308 (1973), given the presence of an important due process issue. See e.g. Williams v. Kaiser, 323 U.S. 471 (1944); Tomkins v. Missouri, 323 U.S. 485 (1944).

The States have an undeniable interest in criminal proceedings even on collateral review, Wainwright v. Sykes, 433 U.S. 72 (1977) and this Court has at least once recognized that states are entitled to

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[3] Foster v. State, (petition for certioarari to be filed); State v. Meyer, 430 So.2d 440 (Fla. 1983)

"justice". Snyder v. Massachusetts, 291 U.S. 97 (1933). Despite this decision, a state may be victimized, as here, by an entirely ex parte adjudication of its rights and interests, without recourse.

The problem is not merely "episodic", Rice v. Sioux City Cemetary, 349 U.S. 70 (1954), nor does it involve an issue of "state law".[4] It is a significant problem which manifests itself in a myriad of ways, all capable of repetition yet evading review. Gerstein v. Pugh, supra. Here, Florida was not given notice or argument on a claim of reversible error. In State v. Meyer, 430 So.2d 440 (Fla. 1983), the court

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[4] While the Florida Supreme Court may examine an entire record for "error" on direct review, collateral attack can not serve as a "second appeal". Tafero v. State, 459 So.2d 1034 (Fla. 1984). Florida has a recognized procedural default doctrine governing collateral review. Wainwright v. Sykes, supra, as well.

relaxed adherence to the rules of procedure for the defense bar while holding the state to the rules. Cases coming before the courts pursuant to Anders v. California, 386 U.S. 738 (1967) are being resolved by the courts (of Florida) after ex parte judicial review, and without notice or opportunity for argument being given to the State.

We submit that if the due process clause of the Fifth Amendment, applicable "to" the state under the Fourteenth Amendment does not apply to the states to the extent it affords them "due process" rights while in court, then the reservations clause of the Tenth Amendment should.

There is, of course, no logical basis for a system which denies to the people collectively rights which would have to be respected individually. The state, in

criminal prosecutions, is the ad litem representative of the people. While it may be compelled to carry the burden of proof, it can not be denied equal and fair access to the courts.

These continuing abuses of due process combine, we suggest, to provide the special and important basis necessary for the granting of certiorari.

CONCLUSION

Nothing can be more fundamental to our concept of justice than the right to notice,to appear in court and to defend oneself. Every one of these rights have been denied to the State of Florida, thus depriving its citizens collectively of rights which would be respected individually.

The Petitioner is not asking for Supreme Court review of the underlying case. Rather, it is seeking protection of its simple right to due process of law. It is for this reason certiorari is requested.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Robert Weinberg, Esq., and Dianne Smith, Esq., WILLIAMS & CONNOLLY, 839 - 17th Street, N.W., Washington, D.C. 20006; and Larry Helm Spalding, Esq., Office of Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this _____ day of February, 1988.

MARK C. MENSER
Asst. Attorney General

OF COUNSEL

Appendix

SUPREME COURT OF FLORIDA

No. 69,104

FLOYD MORGAN, Appellant,

v.

STATE OF FLORIDA, Appellee.

[August 27, 1987]

PER CURIAM

This case is an appeal from the denial of a motion for post-conviction relief filed under Florida Rule of Criminal Procedure 3.850. Because this case involves the imposition of the sentene of death, following a conviction of first degree murder, this Court has jurisdiction to review the trial court order. Art. V, section 3(b)(1), Fla.Const. We reverse and remand the case for resentencing in a proceeding consistent with this opinion.

The appellant was convicted of the first degree murder of a fellow inmate at Union Correctional Institute. Following a jury recommendation, by a seven to five vote, the trial judge sentenced the appellant to death. On direct appeal, this Court affirmed the judgment of conviction, as well as the sentence. Morgan v. State, 415 So.2d 6 (Fla. 1982), cert. denied, 459 U.S. 1055 (1982). The appellant filed a motion for post-conviction relief, which was denied without hearing. This Court reversed that order and remanded the case to the trial court to take evidence on the motion. Morgan v. State, 475 So.2d 681 (Fla. 1985). On remand, the trial court held an evidentiary hearing and then denied the motion. The appellant now appeals the order denying his Rule 3.850 motion.

On appeal, the appellant asserts two arguments for reversal. The first argument

is that the United States Supreme Court decision in Hitchcock v. Dugger, U.S. ____, 107 S.Ct. 1821 (1987) requires this Court to reverse the capital sentence. Because of our disposition on that issue, we need not reach appellant's second argument, namely that he was deprived effective assistance of counsel during his capital sentencing proceeding.

In the Hitchcock sentencing hearing, the trial judge instructed the jury that "[t]he mitigating circumstances which you may consider shall be the following . . ." 107 S.Ct. at 1824. The judge then listed the enumerated, statutory mitigating circumstances which the jury was permitted to consider in rendering its advisory sentence. As the Court in Hitchcock noted, there is no doubt that the trial judge felt restricted to those statutory mitigating factors.

The trial judge in this case in the proceedings below, instructed the jury in precisely the identical manner. Using the same language, the court expressly precluded the jury from considering any factors except those enumerated in section 921.141(6). Moreover, the court, in its order sentencing the appellant to death, examined the list of statutory mitigating circumstances and determined that none were applicable. Nowhere in his order is there any reference to any nonstatutory mitigating evidence proffered by the appellant. The state argues that there is no evidence that the trial court refused to consider such nonstatutory mitigating circumstances. We disagree with this view of the record. Our reading of the record leads to one conclusion. That is, that nonstatutory mitigating factors were not taken into account by the trial court, as

required by Lockett v. Ohio, 438 U.S. 586 (1978), and now Hitchcock.

The Supreme Court in Hitchcock found this failure to consider nonstatutory mitigation to be dispositive:

> We think it could not be clearer that the advisory jury was instructed not to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669 (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978).

107 S.Ct. at 1824. Here, as in Hitchcock, it is clear that the trial judge did not allow for consideration of nonstatutory mitigating circumstances.

While it is true that the appellant was permitted to proffer evidence to rebut, explain, or refute aggravating circumstances presented by the state, this

does not comport with the requirements of Lockett or Hitchcock. Such a limit on the admission of nonstatutory mitigating evidence places the proffering of that evidence entirely within the control of the prosecution. This we will not permit. It is abundantly clear from the record that the jury was not able to consider, and the trial judge did not take into account, any evidence of nonstatutory mitigating circumstances.

This error may not be considered harmless in light of the close nature of the jury recommendation one of death rather than mercy. Under such, and other circumstances, the failure to consider nonstatutory mitigating factors can not be termed harmless error.

Because our determination that the appellant is due a new sentencing hearing, we need not address the issue of whether

appellant was deprived effective assistance of counsel at the original sentencing proceeding. Any claim of ineffectiveness is mooted by our granted of a new sentencing proceeding.

The order of the court below, denying the appellant's 3.850 motion is hereby reversed. We remand this case with directions to vacate the sentence of death and conduct, with a new jury, a sentencing proceeding consistent with this opinion.

It is so ordered.

McDONALD, C.J., OVERTON, EHRLICH, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Alachua County,

Theron A. Yawn, Jr., Judge - Case No. 77-141-CF

Robert L. Weinberg and Dianne J. Smith of Williams & Connolly, Washington, D.C.; and Larry Helm Spalding, Capital Collateral Representative, Tallahassee, Florida,

for Appellant

Robert A. Butterworth, Attorney General, and Mark C. Menser, Assistant Attorney General, Tallahassee, Florida,

for Appellee.

SUPREME COURT OF FLORIDA

Tuesday
Dec. 22, 1987

FLOYD MORGAN,
Appellant,

v. CASE NO. 69,104

STATE OF FLORIDA,

Appellee. Cir. Ct. No.
77-141-CF
(Union County)

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for appellee, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied, and it is further

ORDERED that the Motion for Stay of Mandate is granted and proceedings in this Court and in the Circuit Court of the Eighth Judicial Circuit, in and for Union County, Florida, are hereby stayed to and

including February 20, 1988, to allow appellee to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

A True Copy

TEST

Sid J. White
Clerk Supreme Court.

TC
cc: Hon. Margie Cason,
Clerk
Hon. Theron A. Yawn,
Jr., Judge

Larry Helm Spalding,
Esq.
Robert L. Weinberg,
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